THE VALIDITY OF THE EMANCIPATION EDICT.

As a contribution to American literature, the paper of President James C. Welling, in the February number of the "Review," is deeply interesting. As a chapter in American history at a period the most perilous in our existence as a republic, it is an addition not without instruction. As an argument, produced nearly twenty years after the promulgation by President Lincoln of that greatest of all state papers—the Emancipation Proclamation—and after the American people have begun to wonder how human slavery ever came and continued to exist in a civilized country—as an argument impeaching the validity of that proclamation, this paper by President Welling is, in the light of the present, exceedingly ingenious and remarkable. With great apparent attention to detail, evidenced by quotations from sources varied and numerous, the writer invites his reader along after the manner of a plausible advocate who is determined to gain his case before the testimony has been heard. And by this there is no intention to charge misquotation or anything of the sort, for such does not appear. But it is charged that the historic sketch does not give a fair estimate of the history of the Emancipation Proclamation, or of the relation thereto of its sublime author.

In the first place, it is true that President Lincoln took the oath of office with the profoundest feelings of awe respecting the sacredness of the Constitution which he was sworn to defend and support. It is probable that no man ever lived who had a keener sense of his obligations to his Creator and his fellow-men, and who discharged those obligations more conscientiously, than did Abraham Lincoln. Necessarily, then, is it true that he did not rush headlong into any measure or action. And, when once convinced that a path opened before him designed for his footsteps as the President of his country, he walked therein with unfaltering courage and unwavering devotion, pressing toward the mark ever kept in view—"to save

the Union." He felt the load of a nation upon his shoulders, and most righteously did he bear the burden.

No one will deny that Lincoln was opposed heart and soul to human slavery. His debates with Douglas, his early and later career, his every utterance public and private on the subject, bear testimony to this statement. At the same time he recognized the fact that slavery existed, and that there was a recognition of the evil in some of the courts and laws. At the threshold of his administration he was confronted with a war of rebellion on the part of seceding States, the avowed purpose of which war was to destroy the Union and establish a confederacy, the corner-stone of which was to be negro slavery. In such a complexion of affairs did Lincoln enter upon the Presidential office. Yet the learned writer seems in great part to have failed in the comprehension of the magnitude, the length, breadth, height, and depth of those events and upheavals, and the solemnity of the hour.

This appears the more manifest when the reader of his paper comes to analyze the historic sketch, and finds so much stress placed upon the motes and insignificant details. As preliminary, therefore, to that writer's argument against the legality of the proclamation, what boots it, then, the views of Secretaries Chase, Stanton, Welles, and the rest, regarding the conduct of the war? What difference does it make whether Lincoln favored arming the negro before or after the proclamation was issued? What has any or all of this to do with the legality and effect of the proclamation itself? Why should the writer dwell so persistently on the "Greeley faction" and the "pressure" from abolition sources upon the President to adopt extreme measures in regard to slavery? The criticism is not made because the writer produces history relating to the proclamation, but because what is given is incomplete and one-sided.

"Avowed opposition" to arming the negro does not fairly convey Lincoln's attitude on the question. The President had nowhere "avowed" his opposition to arming negroes as distinct from any other feature of the negro question. At the beginning of the struggle he was unwilling to do anything for or against slavery. Yet the learned writer must know that the question of slavery and emancipation with their incidents was a question of growth, and presented itself like a mountain before Lincoln and the whole country. It became the question of the war. Time was a great leveler of opinions as well as author of mighty issues in those days. No one comprehended the vastness of the question. Lincoln grasped

its import more readily, doubtless, than his advisers or the people. His only aim was to "save the Union." Whatever he did was to "save the Union." Whatever he refrained from doing was in order to "save the Union." With this understanding of his purpose and aims it can not be predicated that President Lincoln had an "avowed opposition" to the arming of negroes.

Neither does this learned writer impart a correct view of President Lincoln's treatment of the representatives from the border States. The writer's comments respecting the interview with these representatives and the synopsis of the interview with the Chicago clergymen are very wide of the facts, because they leave the reader to infer that President Lincoln was flippant in his behavior, and lacked sincerity in affairs of the gravest moment; that he was timid, faltering, and weak. No picture could be farther from the real. He was never vacillating. His nature was patiently to hear arguments, weigh them carefully, and then determine according to law and his conscience. Referring to the lack of harmony between the Union men of the border States and the antislavery portion of the Republican party—that portion insisting on radical measures concerning slavery—the writer declares: "Thus placed between two stools, and liable between them to fall to the ground, he determined at last to plant himself firmly on the stool which promised the surest and safest support." This is a sorry figure of Lincoln, indeed. No one of his tried friends or acquaintances will recognize therein the character of the brave, true, uncompromising Lincoln. To multiply examples would be tedious.

In short, from the historic sketch of the learned writer; from his piecemeal quotations of original and secondary evidence; from the diary extracts; from the continual putting forward of the incessant "pressure," "pressure," and the "Greeley faction"—the irresistible inference is that Lincoln came up to the point of proclaiming emancipation like a sheep driven to the shambles; that he squirmed and put off the question, and allowed himself to proclaim something against his will, and in which he had little faith or none; that the proclamation of emancipation was launched forth as a toy-ship, simply to see the spectacular effect!

He asserts, in no indistinct language, that Lincoln was weak and vacillating when he declares: "Doubtless there are those who, on the view here presented, will tax Mr. Lincoln with undue subserviency to party. But it is only just to remember that he tried to avoid its necessity, as with strong crying and tears; that he was

called in his political geometry to deal with problems, not theorems; and that he was a tentative statesman, who groped his way *à tâtons*, not a *doctrinaire*."

The writer then proceeds to consider the force and effect of the proclamation, "viewed in the light of constitutional and of public law. . . . The questions presented," he says, "by the proclamation of January 1, 1863, in the shape actually given to it by Mr. Lincoln, are these:

"*Firstly.* Had the President of the United States, in the exercise of his war powers, a right, under the Constitution and by public law, to decree, on grounds of military necessity, the emancipation and perpetual enfranchisement of slaves in the insurgent States and parts of States?

"*Secondly.* Did such proclamation work, by its own vigor, the immediate, the unconditional, and the perpetual emancipation of all slaves in the districts affected by it?

"*Thirdly.* Did such proclamation, working *proprio vigore*, not only effect the emancipation of all existing slaves in the insurgent territory, but, with regard to slaves so liberated, did it extinguish the status of slavery created by municipal law, insomuch that they would have remained for ever free, in fact and law, provided the Constitution and the legal rights and relations of the States under it had remained, on the return of peace, what they were before the war?

"Unless each and all of these questions can be answered in the affirmative, the Emancipation Proclamation was not authorized by the Constitution or by international law, and, so far as they must be answered in the negative, it was *brutum fulmen*. It remains, then, to make inquiry under each of these heads."

Such are the propositions of the learned writer. He then proceeds to answer in the negative "each and all" of the questions, and hence comes to the conclusion that the Emancipation Proclamation was "*brutum fulmen*"—*a harmless thunderbolt*—"extra-constitutional"—so far outside of the Constitution that an amendment was required to bring the proclamation inside of the Constitution, and that "it seems a waste of logic to argue the validity of Mr. Lincoln's edict." Many readers, doubtless, have been filled with surprise and indignation to find in this year of grace—more than seventeen years after the *fact* of emancipation—that a writer comes forward to announce to the world that Lincoln was an *experimental, irresolute* statesman; that he issued the proclamation in the first instance as a "political

necessity"; that the proclamation itself was a "harmless thunderbolt"; that it was contrary to international law and was unconstitutional; and that it is "a waste of logic" to defend its validity. Such papers, such arguments, and such conclusions, are in keeping with much of the logic and rhetoric heard throughout the land during the nation's struggle for life, and since the close of that struggle. Similar are they to the unceasing clamor that it was "unconstitutional" in 1860 and 1861 to use coercion to stay secession; it was "unconstitutional" for President Lincoln to call for seventy-five thousand troops to quell the insurrection; it was "unconstitutional" to suspend the writ of *habeas corpus;* it was "unconstitutional" to raise money or men for the support of the Union army; "unconstitutional" was it to do or say aught against treason or toward suppressing the accursed rebellion; the same logic and rhetoric that in 1864 pronounced the war to suppress rebellion a failure, and demanded peace on any terms; the same that since the war in every possible manner have opposed reconstruction and complete restoration of the Union.

The processes by which negative answers to the interrogatories quoted above are reached by Mr. Welling remain to be considered. To begin with, let the proclamation itself speak. It is entitled "A Proclamation," and recites:

Whereas, On the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing among other things the following, to wit [then follows the warning clause in the September proclamation, declaring that the President would on January 1, 1863, issue a proclamation liberating slaves of all persons then in rebellion against the United States; the clause continuing that the President would on January 1, 1863, designate the States and parts of States in rebellion; and the proclamation proceeds]:

Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and Government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, publicly proclaimed for the full period of one hundred days from the day first above mentioned, order and designate as the States and parts of States wherein the people thereof, respectively, are this day in rebellion against the United States, the following, to wit [then follows a list of States and parts of States then declared to be in rebellion, the paragraph closing with the words, "and which excepted parts

are for the present left precisely as if this proclamation were not issued," and then continuing]:

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are and henceforward shall be free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

. . . . And I further declare and make known that such persons of suitable condition will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, seriously believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.

In witness whereof, etc.

This is the proclamation that is assailed as being against international law and unconstitutional. Here let it be distinctly noted: that President Lincoln, in issuing the proclamation, relied solely upon his powers under the Federal Constitution, "as Commander-in-Chief of the Army and Navy of the United States in time of actual armed rebellion"; that the proclamation was issued as "a fit and necessary war measure for suppressing said rebellion"; that the proclamation did not *pretend* to touch the slavery question in Maryland, Kentucky, Missouri, Tennessee, and parts of Louisiana and West Virginia; that the insurgents had received one hundred days' notice of this January proclamation; that "the Executive Government of the United States, including the military and naval authorities thereof," would "recognize and maintain the freedom of said persons"; and that such liberated persons would be received into the military service of the United States.

I. In the first place, as the reader who has read the attack upon the validity of the proclamation can not fail to perceive, that writer bases his argument and deductions upon the doctrine and rules of international law. His conclusion is, that the Emancipation Proclamation was not only contrary to international law, but was "unconstitutional"—contrary to the Constitution of the United States! The simple statement of the premise, argument, and conclusion of that writer is sufficient, it seems, to exhibit the glaring fallacy of his reasoning.

At the outset of his argument he asserts it to be a well-settled principle that when the doctrine of international law applies at all to a war or condition of affairs, the same doctrine applies at all

times and in all places throughout such war and condition of affairs. If this proposition be true, what pertinency had the Constitution of the United States to the States in rebellion or the Emancipation Proclamation, or to any measure or policy of the United States Government during the rebellion? How could the Emancipation Proclamation be "unconstitutional," if it could be issued only in accordance with the rules of international law? The fallacy is apparent.

But this error is insignificant when compared with others of the writer in question. His fatal and fundamental error is in the endeavor to bring the question of the Emancipation Proclamation under the doctrine of international law in any respect or particular. He begs the question when he assumes that international law is applicable. What is international law? Is it necessary to be rudimental here? The words themselves carry their definition—*the rules of law governing nations, independent states, in their mutual intercourse.* It is the law between independent nationalities. International law has application to independent sovereign states, recognized as such by civilized nations. It has nothing to do, in the first instance, with rebels in arms, savages, or barbarians. Only after the state's independence is recognized by civilized nations, and the state takes on the insignia of a separate and distinct nationality, capable of maintaining its sovereignty, does international law intervene to determine rights and duties. The writer's error is in assuming a false premise for his logic, namely, in assuming that the States in rebellion were entitled to be recognized as a separate and independent State. He exalts seceding and rebellious States, ingredient parts of one nationality, to the dignity of an independent nationality. Having thus exalted secession to this high plane, the writer then proceeds to apply the rules of international law as he construes them. It seems almost a waste of breath, but necessary, to call to mind that the war of the rebellion was not an international war. It was a war of secession, bitter and wicked, aimed at the life of the Union and liberty, and the equality of men before the law. It was a war to destroy the Union and establish slavery. It is important to call things by their right names, and not soar off into glittering phrases about "Confederate States" and "international law." It was none the less treason because the Federal Government, with magnanimity and forgiveness immeasurable and without parallel, condoned and pardoned the greatest of crimes against one's country. Had the rebels in arms succeeded in establishing a

government of their own, as they set out to do, and had their independence been recognized by other nations, then there would be some force in the claim that rules of international law must apply in disposing of the question of slavery and all other questions growing out of the war. It seems necessary to remind Mr. Welling that the rebellion did *not* succeed, and that the seceding States were never, by any state or nationality, recognized as an independent nation. These facts of history ought to be a complete refutation of that writer's entire argument, so far as international law is concerned. That the sun shone yesterday, is a *fact* all men admit. To argue for what *might* have happened had there been no sunshine yesterday would be very like the argument to dispose of the Emancipation Proclamation by rules of international law. However, it may throw additional light upon his inaccuracies to follow him further in his argument respecting international law.

The doctrine of *postliminy* is relied upon by the writer under review. He describes the doctrine as the law "*according to which persons or things taken by the enemy are restored to their former state when they come again under the power of the nation to which they formerly belonged.*" And this is the definition given by Chancellor Kent and other text-writers. In other words, the definition means, as applied by Mr. Welling, that, when the war closed and hostilities ceased, the blacks were restored to the power of their former owners, and were *ipso facto* remanded to slavery. An extended search for authorities has failed to discover one in support of such a deduction. Is not the fallacy of the claim apparent on its face? What are the facts?

President Lincoln went into office in 1861. Secession was staring the Union in the face. Several States attempted to secede from the Union. A gigantic rebellion raged for fully four years. The *avowed purpose* of that rebellion was to destroy the Union and establish a Confederacy based upon human slavery. President Lincoln said, December 1, 1862: "Without slavery the rebellion could never have existed; without slavery it could not continue."* In a speech at Savannah, Georgia, March 21, 1861, the Vice-President of the so-called "Confederacy," in explanation of the rebel Constitution, among other things declared: "The new Constitution has put at rest for ever all the agitating questions relating to our peculiar institutions—African slavery as it exists among us—the proper status of the negro in our form of civilization. *This was the imme-*

* President Lincoln's second annual message.

diate cause of the late rupture and present revolution. Jefferson, in his forecast, had anticipated this as the 'rock upon which the old Union would split.' He was right. . . . The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. . . . This idea, though not incorporated in the Constitution, was the prevailing idea at the time. . . . Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. . . . Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests (*sic*) upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition."* The war was universally denominated by the rebels and their sympathizers as an "abolition war." On the part of the Federal Government the war was prosecuted in the first instance and throughout ostensibly and in fact to defend and save the Union, without regard to slavery, up to the date of the Emancipation Proclamation. When the proclamation came, the issue was joined on the question of slavery. From that time forth abolition of slavery was the *sine qua non* to peace and readmission to the privileges of the Union. This principle was steadily asserted and adhered to in every act, message, and official expression of the Administration subsequent to the date of the proclamation. There was no step or utterance backward on the part of the Federal Government. The rebels recognized the issue thus joined. In January, 1863, almost immediately after President Lincoln had issued the proclamation, the question arose in the so-called Confederate House of Representatives as to terms of peace to be demanded by the rebels in the event of any negotiations. A member from Tennessee introduced resolutions on the subject. Their purport to a great extent was: "There is no plan of reconstructing what was formerly known as the Federal Union, to which the people of the Confederate States will ever submit"; in no case would the "Confederate States" unite with "New England," although they would be glad to receive any of the Northwestern States on certain conditions. The resolutions contained further: "While the Confederate States of America are not at all responsible for the existing war, . . . they

* McPherson's "Political History of the Rebellion," 1860–1864, p. 103.

could not yield their consent to an armistice of a single day or hour, so long as the incendiary proclamation of the atrocious monster, now bearing rule in Washington city, shall remain unrevoked. . . . Whenever the friends of peace in the North shall grow strong enough to constrain Abraham Lincoln and his flagitious Cabinet to withdraw said proclamation," then an armistice might be arranged. The "Atlanta Intelligencer" of January 20, 1863, bitterly opposed these same resolutions, and said: "We desire now solemnly to protest against [the resolutions], and we trust that they will be tabled by the Confederate Congress, whenever they are taken up to be considered. We are fighting this war for Southern independence, and for a government of Southern States recognizing African slavery as an institution ordained of God, beneficial to mankind," etc.* In December, 1863, the Governor of North Carolina wrote to Jefferson Davis urging the importance of negotiations for peace. Davis replied, expressing the utter fruitlessness of such negotiations, giving as a reason that repeated efforts had been made to effect a peace conference with the United States, all of which efforts had been rejected by the Federal Government. Among other things he said, "Have we not just been apprised by that despot [Lincoln] that we can only effect his gracious pardon by emancipating all our slaves, swearing allegiance and obedience to him and his proclamation, and becoming, in point of fact, the slaves of our own negroes?"*

Surely these quotations are sufficient to show that the issue as to slavery was clearly defined, and that the proclamation was recognized by the secessionists as something more than a *harmless thunderbolt.* The disunionists were parties to the case then being tried by wager of battle, and it is of the first importance to know how the question of slavery and of the Emancipation Proclamation was regarded by them. They had every possible notice before and after the issue of the proclamation that peace and union would never come without the abolishment of slavery. They were having their day in the court of last resort with this issue clearly before them. How was the issue decided? Could anything be plainer than this: that the surrender of Lee at Appomattox and the laying down of arms by the insurgents were upon the express condition of abolishing slavery? And the trite maxim in law applies—*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*—every

* McPherson's "Political History," etc., p. 303. † Ibid., p. 307.

ratification of an act already done has a retrospective effect, and is equivalent to a previous request to do it. Prior negotiations for peace had failed, because the insurgents were not willing to recognize and accept the condition. Referring again to the definition of *postliminy*, can it be truthfully asserted that, upon or after this surrender and the acceptance of the condition, the blacks were "restored to their former state," and that they came again "under the power of the nation to which they formerly belonged"? The definition of *postliminy* itself answers in the negative.

Under this first division of his argument, the writer places great store by what he terms a "precedent" furnished by the war of 1812, where Great Britain paid a large indemnity to the United States for slaves emancipated during that war. The writer emphasizes this case, and argues that it is quite conclusive in its application to the war of the rebellion, and this, too, on principles of international law! The writer says: "In the face of a precedent so set and so adjudicated by these great powers, acting under the law of nations (and one of them subsequently known as the leading antislavery power of the civilized world), it would seem that, as a question of law, the first interrogatory must be answered in the negative." The writer is exceedingly unfortunate in his citation, as can be demonstrated. What were the facts in the case? During the war of 1812, Great Britain had freely exercised the right to emancipate slaves of American owners, and large numbers were liberated by proclamation and otherwise. The war closed, and the Treaty of Ghent followed in 1814. One article of this treaty *expressly stipulated* that Great Britain should indemnify the United States for certain slaves so liberated. This was one of the *conditions* of peace. It was a part of the contract between the parties. Then the question arose as to *how much* England should pay the United States as indemnity, under the treaty, and this inquiry as to amount was referred to the Emperor Alexander of Russia. Alexander made his report in general terms, finding that, according to the treaty, England should pay for slaves taken from certain places. This finding was inexplicit, and a dispute arose, England claiming that by the finding she was excused from paying for a certain class of slaves liberated. This dispute was referred back to Alexander. Count Nesselrode, for the Emperor, replied, reaffirming more distinctly the former finding as to what slaves were to be paid for, and added: "But that, if, during the war, American slaves had been carried away by the English forces from other places than those of

which the Treaty of Ghent stipulates the restitution, upon the territory or on board British vessels, Great Britain should not be bound to indemnify the United States for the loss of these slaves, by whatever means they might have fallen or come into the power of her officers."* The award was made in 1822, and required over one million dollars to be paid to the United States. Now, it is incomprehensible how such a case can be cited as a "precedent" to be followed by the United States in a war of rebellion! The Treaty of Ghent as a precedent for the United States in a war with seceding States! But that writer says the United States *claimed* of England indemnity for slaves liberated. True, and England *agreed* to pay for certain of those set free. But the Emperor said, in the quotation made above, that as to certain slaves liberated "Great Britain should not be bound to indemnify the United States." Here was an express recognition of England's right to emancipate slaves during the war without paying indemnity. The United States never made any *treaty* with the seceding States, wherein she agreed to pay for slaves emancipated during the rebellion. Had such a treaty been made, then the Treaty of Ghent might have been cited as a precedent. Yet the Treaty of Ghent case is the only "precedent" cited by the learned writer.

The precedents, however, are opposed to the theory that slavery can not be abolished by decree of emancipation. Had the writer under review gone back a few years in American history, he would have found the right freely applied. In the war of the Revolution the mother-country did not hesitate to exercise that right. Sir Henry Clinton, Lord Dunmore, and other British commanders, made free use of proclamations and orders to liberate the slaves of the colonists.† At the close of the Revolutionary war the United States claimed indemnity for the slaves thus emancipated by British commanders, and endeavored strenuously to incorporate the claim in the Treaty of 1794; but England as strenuously refused to acknowledge the claim, and no indemnity was ever allowed.‡

II. In the second place, following the order of the writer's argument, his first statement is: "No principle of public law is clearer than that which rules the war rights of a belligerent to be correlative and commensurate only with his war powers"—the conclusion

* Lawrence's Wheaton, p. 496, *note*.

† Arnold's "Lincoln and Slavery," pp. 707–709, *et seq.*

‡ Lawrence's Wheaton, p. 611, *note*.

being that, because the Federal authority did not extend by armed force throughout the insurgent territory, therefore the proclamation did not and could not operate where the Federal authority had no *de facto* power. This is relying upon technicalities, and proves too much. For the argument was, that the proclamation was not authorized either by international law or by the Constitution. And the writer admits that wherever the *de facto* power extended the proclamation was effectual. Hence, to refute this branch of the writer's argument it need not be contended that each and every bondman was, on January 1, 1863, *eo instanter*, made free. Halleck is quoted as authority to sustain his statement. Had the writer gone one section further he would have found a qualification to the "paper-blockade" quotation in this form: "It must not be inferred, from what has just been said, that the conqueror can have no control or government of hostile territory, unless he occupies it with an armed force. It is deemed sufficient that it submits to him and recognizes his authority as a conqueror; for conquests are in this way extended over the territory of an enemy without actual occupation with armed force." *

As a fact of history the blacks generally, throughout the entire South, on the first day of January, 1863, regarded themselves as liberated, and acted accordingly. And, as a result of the proclamation, they came flocking by hundreds and thousands into the Union camps, until more than one hundred and thirty thousand able-bodied negroes were fighting and laboring heroically in the armies of the Union. The views advanced hereinbefore under the first division of the argument apply here. The people in rebellion themselves recognized that the proclamation abolished slavery, and ratified the act and fact when they laid down their arms.

It is not worth while to notice the case of the Amy Warwick, cited by the writer under this branch of his subject. That was a decision made in 1862, by an inferior court of the United States, involved a question of maritime capture under the Confiscation Act, and has no application to the question under discussion. The writer persists in confounding the question at issue by assuming and arguing that the war on the part of the Federal Government was prosecuted as a war of *conquest*. The war never was prosecuted for conquest, in the sense of conquering and taking enemy's territory;

* Halleck's "International Law," chapter xxxii, section 3.

but it was prosecuted simply to preserve and restore the Union. The Emancipation Proclamation neither attempted nor assumed to conquer territory or to confiscate property. The proclamation declared: "That all persons held as slaves . . . are and henceforward shall be free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." Has not the "Executive Government of the United States, including the military and naval authorities thereof," kept its faith and *recognized* and *maintained* "the freedom of said persons"? Have not the negroes, embraced in the terms of the proclamation, been in fact free ever since? Proclamations, laws, and decrees depend for their efficacy upon actual fact, and upon the power of the sovereign authority to enforce obedience.

III. With respect to the writer's argument on the third interrogatory it may be stated, as a general criticism, that it deals more with imaginary and hypothetical difficulties than with realities. He relies upon Lord Stowell's decision in the case of the slave Grace. This was a case arising in English admiralty practice, where a slave named Grace was taken by her master to England from the West Indies. After remaining in England for some time, she returned, voluntarily it appears, with her master to her former home. English authorities brought Grace before an English court, and sought to liberate her as an English subject, on the ground that she had been made free by setting foot on English soil. Lord Stowell held that this did not make her free when she returned with her master into her place of former servitude. The question related in no manner or form to the power of a government or belligerent to emancipate slaves during war or at any other time. The citation is very far fetched. The writer is in error when he says the doctrine laid down by Lord Stowell has been accepted ever since as the law. It has not been the accepted doctrine, by any means, for there has been continuous opposition ever since. Lord Mansfield's decision to the contrary, although rendered previously, in the case of the negro Sommersett, has been as much the accepted doctrine as Lord Stowell's decision. And in view of the fact that international law does not recognize human slavery, according to the ablest modern writers, it is rather singular that the writer should make this assertion, and place his reliance upon a case decided more than *half a century ago*. It is astounding that the writer should style the decision of Lord Stowell as the "accepted doctrine." The

authorities are exactly the reverse in modern times, and sustain the maxim that the "air makes free." *

Under this third subdivision the writer cites as an authority a work on the "Law of Freedom and Bondage." The alleged authority amounts to this: The author of that work appends a note on the subject of emancipation. The note was written after the war of rebellion had commenced, but *before* the Emancipation Proclamation was issued, and that author is simply speculating as to what *might* happen if the authorities at Washington should conclude to proclaim emancipation; and that author adds in substance that, *if* such a proclamation should be issued, questions would naturally arise as to whether a redistribution of State powers would become necessary. This is simply the imagination of one individual before the fact. It is not authority. Yet these authorities, so called, are sufficient, with the Amy Warwick case, for the learned writer to affirm: "It is safe, therefore, to say that the third question above indicated must equally be answered in the negative."

The writer finds consolation for his views in the alleged fears of Lincoln himself concerning the efficacy of the proclamation, and in the fact that Lincoln favored a constitutional amendment. But this does not in any way affect the validity of the proclamation or its force. President Lincoln's proclamation may be likened to a judgment of the court at *nisi prius*. It was valid and effectual from its date unless subsequently reversed, vacated, or modified by a superior tribunal. It never has been reversed, modified, or vacated in any manner; nor has there been any attempt in that direction.

The German writer Bluntschli is cited to the proposition which, as stated, no one would deny, viz., that domestic institutions can not be altered by proclamation. A conquering sovereign does not attempt to change laws of marriage, or local laws, generally speaking. But this does not forbid the sovereign's using every power on earth, that is not inhuman or barbarous, for his own defense and self-preservation. A very careful examination of this German writer at the point cited fails to discover that the page contains anything bearing upon the proposition under inspection. The page quoted does treat of the war powers of the conqueror, but not of the question at issue. It may be remarked here that Bluntschli is

* Woolsey's "International Law," sec. 74, fifth edition; Phillimore's "International Law."

in harmony with the leading writers on international law, when he says, "There can be no such thing as human slavery according to international law." * Neither do the citations from Cadwallader's "Digest" sustain the writer's proposition. On the contrary, the pages cited refer to authorities that militate very strongly against the entire line of argument pursued by Mr. Welling, especially so in the case of New Orleans *vs.* Steamship, † which magnifies the war powers of the sovereign authority.

The writer finally clinches his citations by declaring: "And hence it is no matter of surprise that the first international lawyers of the country, like the Hon. William Beach Lawrence, and the first constitutional lawyers of the country, like the late Benjamin R. Curtis, have recorded their opinion as jurists against the legality of the Emancipation Proclamation." No reference is made to the spot where these men have so recorded their opinions. The section, page, and work should have been given, and then it is possible that a question would have been raised as to what their opinions really meant. However, as to Mr. Lawrence, it may be said that his annotations of Wheaton's "Elements of International Law" would justify the student in concluding that, in his opinion, emancipation by proclamation was outside of President Lincoln's constitutional power. This is the same William Beach Lawrence who has placed a note at the bottom of page 614 of Wheaton. In this note Mr. Lawrence, on this very subject of emancipation, which was then shaking the Union to its foundation, does not express a positive opinion as to its validity. But he does take special pains to refer to a then recent English review of a paper written by Mr. Lawrence on the subject of slavery and commerce in the United States. And Mr. Lawrence, in reviewing this reviewer, says: "The whole question, respecting manumission, is thus summarily enunciated: 'Economically regarded, the question of negroes or no negroes is brought within a narrow compass. No blacks, no cotton; such is the finality.'" These were the sentiments of William Beach Lawrence in 1863, soon after the proclamation was issued. "No blacks, no cotton; such is the finality." In the light of present facts, the soundness of Mr. Lawrence's speculative opinion may be questioned. According to the report of the Chief of the Bureau of Statistics for 1879, the product of cotton in the United States from 1851 to 1860

* Bluntschli, "Das Moderne Völkerrecht," section 360.

† 20 Wallace, p. 387, *et seq.*

was 33,584,611 bales; from 1870 to 1879 it was 41,455,008 bales; an excess for the last ten years of 7,870,397 bales.*

Thus far the object has been to present the argument brought forward by Mr. Welling, and in the same order of argument to adduce answers to his conclusions. It remains to add some general observations on a subject boundless in extent and interest.

The Emancipation Proclamation should be considered not in the theoretical light of an ingenious and technical writer, but from the exalted summit of the great author of the work and in the spirit and intent of the document. It should be considered in its relations to the Federal Constitution and actual facts. President Lincoln assumed to issue the proclamation only by virtue of power given in the Constitution. The proper inquiries, then, would be: Was the proclamation constitutional? Did it accomplish the work for which it was intended? The answers to these inquiries, in connection with what has been written, are not difficult, and may be brief.

It is self-evident, at this period of the nineteenth century, that human slavery is contrary to the law of nations, is contrary to physical law and moral law, and is a crime against civilization. If so now, it always has been illegal and tainted with these infirmities. The Declaration of Independence, which is the Magna Charta of American liberties, proclaims the truth of these axiomatic propositions when it declares: "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." The Constitution can not be rightly interpreted without reference to the Declaration of Independence.

It should be remembered, too, that the Federal Constitution nowhere uses the word "slave" or "slavery." It is a matter of history that the framers of the Constitution, in large part at least, were anxious to abolish slavery, and prohibit the traffic by the organic law itself. This element did not succeed, and it is true there is in the Constitution *implied* recognition of slavery; but every such implied recognition carries on its face the potent admission and recognition of the great truth that slavery was then, ever had been, and always would be a curse to civilization. Let the Constitution speak for itself.

This instrument, including the first twelve amendments, con-

* "Internal Commerce for the United States," 1879, by Joseph Nimmo, Jr.

tains but *five* references, expressed or implied, to the "institution." The first occurs in relation to the apportionment of representatives and of direct taxes, and which apportionment is to "be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three fifths of all other persons." * This is reference number one, and it can not easily be said that it contains a *recognition* of slavery. Reference number two is more explicit. It reads: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." † Here the implication is very strong that, *after* the year 1808, measures might be adopted prohibiting slavery altogether, if it existed in any of the States, which is not admitted. The clause contains explicit notice to slave-holders, if there should be such, that slavery sooner or later might be abolished. Reference number three occurs in the same section, and reads: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore [reference number one] directed to be taken." The next reference is in that clause which gave foundation for the fugitive-slave law. It reads: "No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." ‡ This is reference number four. Does it contain any recognition of slavery as a right under the national Constitution? It would require a fine process of reasoning to answer in the affirmative. It does say that a person held to service in one State, and escaping into another, shall not be discharged from such service by reason of any law of that State into which the person escapes. But it does not declare that Congress, or the President of the United States, or other national authority shall not abolish slavery, or emancipate slaves for the purpose of saving the Union in time of armed rebellion. The fifth and last reference occurs in the article respecting amendments to the Constitution, and provides: "That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth

* Art. I, sec. 2. † Art. I, sec. 9. ‡ Art. IV, sec. 2.

clauses [references two and three *supra*] in the ninth section of the first article." *

These constitute all and singular the references to "slavery" in the Constitution. Did not slavery for three quarters of a century prior to the Proclamation of Emancipation hang by a very slender thread so far as the Constitution was concerned? It seems absurd to talk about the "rights of slavery" under the Constitution. The most direct references are coupled with stipulations as to the year 1808, implying in terms as direct as possible that after the year 1808 laws would be directed against slavery. Thus it may be concluded that the Constitution contained no prohibition of President Lincoln's proclamation.

On the contrary, it will be discerned that the Constitution contains the strongest terms of approval for the promulgation of that proclamation. It would be a narrow and prejudiced vision which should presume to ascribe to the founders of the Constitution a forecast of every possible emergency that might arise in our future history. Hence, questions have arisen repeatedly in regard to the respective powers of the legislative, executive, and judicial branches of the General Government. Such questions will continue to arise so long as the Union lasts. Enough history has been made, however, particularly during the war of the rebellion, by adjudicated cases and otherwise, sufficiently to demonstrate this one truth, viz., that the war powers of the Federal Government, in every branch of it, are almost boundless. In other words, these war powers of the legislative and executive branches of the Government, by virtue of the Constitution, are amply sufficient to preserve the Union, not only against foreign enemies, but against armed rebellion and secession at home. The United States have inherent power to save themselves. It would be a mockery of national sovereignty if this were not so. The Constitution supports this view.

To begin with, the preamble is the key to the Constitution and to the sovereignty of the United States: "*We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*" May it not be permitted to stop at this guide-post to the Constitution while one impresses indelibly into his consciousness every word and syllable of the great

* Art. V.

thought of this immortal sentence? Then let it be asked whether it be possible to conceive of any agency, power, or means, legislative or executive, that might not constitutionally be used to save and defend this "more perfect Union." Can it then be said that Abraham Lincoln, as President and Commander-in-Chief of the Army and Navy of the United States, with the sworn purpose to save the Union, "in time of actual armed rebellion," and for the purpose of "suppressing said rebellion," committed an unconstitutional act when he proclaimed emancipation?

The Constitution contains many affirmative provisions for the preservation and defense of the Union—among them, that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."* "No State shall enter into any treaty, *alliance*, or *confederation*."† "The executive power shall be vested in a President of the United States of America."‡ "The President shall be Commander-in-Chief of the Army and Navy of the United States, . . . and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," § and "*he shall take care that the laws be faithfully executed.*" ‖ "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." ¶ "The United States shall guarantee to every State in this Union a republican form of government." ** "*This Constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.*" ††

The Supreme Court of the United States—the only tribunal whose decision would be authoritative in such a matter—has never been called upon to pass directly upon the validity of the Emancipation Proclamation. But many questions of vast moment growing out of the war, and closely related to the proclamation, have been adjudicated in this Court. And hence we are justified in looking to these cases on kindred subjects.

Almost without exception the Presidential acts, exercised as war powers, have been upheld by the Supreme Court during and since

* Art. I, sec. 8. † Art. I, sec. 10. ‡ Art. II, sec. 1.
§ Art. II, sec. 2. ‖ Art. II, sec. 3. ¶ Art. III, sec. 3.
** Art. IV, sec. 4. †† Art. VI.

the war. Prior to the rebellion important decisions had been rendered defining the war powers of the President. In one case Chief Justice Taney said: "As commander-in-chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States." * Military orders issued under President Polk in the case of the accession of California, were upheld as constitutional by the Supreme Court. † The provisional courts established by the President in rebel territory during the rebellion have been held constitutional. ‡ The case of Hamilton *vs.* Dillin § is one which gives great prominence to these war powers of the President. The case of Texas *vs.* White is one that should be read by every American citizen who would have a clear view of the powers of the national Government and of the Government's powers of self-preservation.

There is another consideration necessary to a full understanding of the Emancipation Proclamation. It relates to the legislation of Congress prior to the proclamation. There can be no doubt that previous legislation completely justified President Lincoln in making the proclamation. Indeed, Congress explicitly and directly empowered the President to do exactly what he did. It will suffice to refer to one act of Congress, approved July 17, 1862, and entitled "*An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.*" The act is full, and can not be quoted at length. The closing paragraph provides, "*That the President is hereby authorized at any time hereafter, by proclamation* [sic], *to extend to persons, who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.*" The provisions of this act relating to slavery are made part of the preliminary proclamation of September 22, 1862. The proclamation of January 1, 1863, by recitals adopts the September proclamation. So that here is the authority for

* Fleming *vs.* Page, 9 Howard, 614.

† Cross *vs.* Harrison, 16 Howard, 189; see Dynes *vs.* Havin, 20 Howard, 78.

‡ Texas *vs.* White, 7 Wallace, 700.

§ 21 Wallace, 74; see 6 Otto, 176, 193; 10 Otto, 257.

emancipation by direct act of Congress. Likewise, subsequent legislation is material. An act of Congress, approved March 2, 1867, declared *valid* and *conclusive* "*all acts*, proclamations," etc., issued between March 4, 1861, and July 1, 1866.* By this reference to Congressional action, it is not intended here to convey the idea that such legislation was *necessary* to justify or make valid the proclamation. Such an intent is distinctly disclaimed. But the proclamation has been assailed as "unconstitutional" and "illegal." Hence the citations to prove that the proclamation was and has been sustained by the "supreme law of the land."

That slavery has been abolished it is presumed no one will gainsay. If abolished, when did it cease? Did emancipation take place when the rebel armies capitulated? Nothing was said about slavery when Lee surrendered. Did it take effect at some period subsequent to the day of surrender? For reasons previously stated it could not have taken effect at a subsequent date. Did it not take effect when President Lincoln, acting for the Federal Government, *intended* it should take effect, on January 1, 1863? Or did the thirteenth amendment abolish slavery? This amendment declares:

> Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

This amendment was submitted by Congress to the Legislatures, February 1, 1865. Secretary Seward certified, December 18, 1865, that it had been duly ratified by twenty-seven of the thirty-six States. Did slavery exist in the United States after the Proclamation of Emancipation and up to the time of ratifying the amendment? Such a supposition is impossible. Relatively considered, there was no more *authority* for the amendment than for the proclamation. *Both* depended and depend for their validity upon the fact of their ratification. The *amendment* was ratified by the Legislatures of the States in the manner prescribed by the Constitution. The *proclamation* was ratified according to military warfare by the surrender at Appomattox. Each depended and depends for its efficacy upon the power of the people of the United States to maintain their provisions. The thirteenth amendment was not *necessary* to the abolition of the status of slavery. It performed the office of an entry on the journal of the court after the trial,

* 14 Statutes at Large, 756, sec. 4.

charge of the court, and verdict of the jury—a very fitting method of perpetuating the issue decided.

The United States Supreme Court has thrown light upon the question as to when military proclamations of the President are to be considered as having taken effect. In a leading case the proclamation was one removing restrictions upon trade and commerce. It bore date June 24, 1865. It was not *published* until June 27, 1865—three days later. A divided Court held that the proclamation took effect as of its date. The dissenting opinion contended it could not take effect until publication—the reasoning of both sides of the Court being based upon the ground that proclamations of the President were like statutes in their nature.*

The most authoritative decision of the Supreme Court, and the one nearest related to the Proclamation of Emancipation, occurs in the opinion rendered in the famous "Slaughter-House Cases." The proclamation was not directly in question, and therefore what is said by the Court in regard thereto is in its character *obiter dictum.* It is not out of place to give a brief quotation. The thirteenth and fourteenth amendments were before the Court for construction. The Court say: "In that struggle [the war of the rebellion] slavery, as a legalized, social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when, hard pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal Government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts when he declared slavery abolished in them all. But the war being over, those who had succeeded in reëstablishing the authority of the Federal Government were not content to permit this great act of emancipation to rest on the actual results of the contest, or the proclamation of the Executive, both of which might have been questioned in after-times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its

* Lapeyre *vs.* U. S., 17 Wallace, 191. See "The Venice," 2 Wallace 258; "The Reform," 3 Wallace, 617; Keith *vs.* Clark, 7 Otto, 454.

fundamental articles. Hence the thirteenth article of amendment of that instrument." *

It is very interesting in this connection to know how the proclamation has been construed and regarded by the Supreme Courts of those States in rebellion—the States immediately affected by it. As might be expected, the proclamation has been before those Courts for construction. A careful examination of all the reports of those States, issued since the rebellion, discloses that the proclamation has been passed upon directly or indirectly in all of these Courts. Generally speaking, the effect of the proclamation has been considered *indirectly*, in connection with other questions, so that the cases are few where the Court has passed upon the proclamation directly. Some of the Courts have made decisions bearing upon it, and then have reconsidered their decisions, leaving the question open. *All* of the Courts recognize, without qualification, that slavery has been abolished. According to the latest decisions, it is held in Georgia that it is unnecessary to decide *when* slavery was abolished. In Mississippi, say the Court, "It has not yet [1870] been adjudicated by the Courts of this State at what precise time slavery was abolished." † In South Carolina and Virginia the Courts have distinctly held that slavery was *not* abolished by the Emancipation Proclamation, but that emancipation was brought about by the war and by conquest. ‡ The Supreme Court of Louisiana has expressly decided that slavery was abolished by the Emancipation Proclamation as of its date, January 1, 1863. § In Texas, the precise question arose in "The Emancipation Cases," decided in 1868. ‖ The Court were divided in opinion—three holding that slavery was *not* abolished by the proclamation. Two of the judges held that slavery *was* abolished by the proclamation, as of January 1, 1863. The dissenting opinion of Mr. Justice Hamilton in this case is a remarkable exhibition of learning, logic, and legal acumen. The majority opinion in this case was subsequently questioned, and the date of emancipation is now an open one in Texas. The Supreme Court of Alabama has delivered the clearest decision of all, to the effect that slavery was abolished January 1, 1863, by the proclamation. The Court held: "The emancipation of slaves in this State is a fact which will be judicially noticed by

* 16 Wallace, 68.
† 43 Mississippi, 102.
‡ 13 "South Carolina Equity," 366.
§ 20 Louisiana Annual, 199.
‖ 31 Texas, 504.

the Courts, and it must be referred to some particular date. It was effected by the nation and not by the State. The only national act that decreed it was the proclamation of the President, of the 1st of January, 1863. The struggle afterward was merely an effort to prevent the proclamation from being carried into effect, and the total failure of the struggle refers emancipation back to that date."* The question afterward arose in this Court, when the *date* of emancipation seemed to be questioned, although this decision was reaffirmed. But Mr. Justice Peters delivered a dissenting opinion, rearguing for the full validity and effect of the proclamation as of its date. His opinion displays great learning and good sense. In support of his reasoning he cites the case of McIlvaine *vs.* Coxe, † decided by the United States Supreme Court, where it was held that the Declaration of Independence took effect as of its date, July 4, 1776, instead of September 3, 1783, when independence was officially recognized. ‡

Viewed as to its results, the Emancipation Proclamation was an overshadowing and glorious success. It united the friends of the Union. It threw into despairing forces new life. It brought into the armies of the Union as by magic one hundred and thirty thousand soldiers from the enfranchised race. It was the death-blow to slavery, not only in the sections embraced in the proclamation, but in the other slave-holding States, for these other slave-holding States at once proceeded to adopt constitutional amendments abolishing slavery. It was a finishing stroke to the rebellion. Without the proclamation, is it not safe to presume that the Union would have perished?

Therefore are these conclusions irresistible: that President Lincoln's Emancipation Proclamation was not contrary to international law; that *by its own force* it abolished slavery as of the date on which it was issued, viz., January 1, 1863; that it was in the strictest sense constitutional; and that no constitutional amendment was necessary to make the proclamation valid or effectual, or to abolish the status of slavery.

The immortal Lincoln was in no sense a smatterer. He was a profound reasoner. He was learned in the law. He studied and understood the Constitution of his country. He did not issue proclamations for sport, or to be hooted at. He did not toy with the mighty concerns of a republic. His every act was governed by

* 43 Alabama, 592. † 4 Cranch, 209. ‡ 44 Alabama, 70.

the sincerest convictions guided by conscience. He was eminently a statesman. Patriotism and heroism were his crowning virtues. Whatever he did as President was done "to save the Union."

AARON A. FERRIS.

[NOTE.—In the August number of the "Review" appears a paper on the same subject by Richard H. Dana, wherein the article by Mr. Welling is cordially endorsed. Mr. Dana goes even further than the previous writer, and styles the proclamation as a "nullity" and as "a curiosity of history." Inasmuch as Mr. Dana simply affirms the conclusions of Mr. Welling, it is not deemed necessary to add anything here.]

A. A. F.